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United Nations Commission on International Trade Law
Thirty-second session

Summary record (partial)* of the 662nd meeting
Held at the Vienna International Centre, Vienna, on Thursday, 27 May 1999, at 2 p.m.

Chairman: Mr. Renger ..... (Germany)

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Privately financed infrastructure projects (*continued*)

* No summary record was prepared for the rest of the meeting.

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V.00-53736 (E)

The meeting was called to order at 2.05 p.m.

Privately financed infrastructure projects (*continued*) (A/CN.9/458/Add.1-9)

Chapter VIII. Settlement of disputes (*continued*) (A/CN.9/458/Add.9)

Judicial proceedings (paras. 60-64)

1. **Mr. Lalliot** (France) said that both the form and the substance of the notes gave cause for concern. For example, paragraph 60 described only the possible drawbacks of court proceedings as a means of resolving disputes. A more balanced approach was needed in the analysis of the advantages and disadvantages of judicial proceedings compared with arbitration, which was discussed more fully elsewhere in the chapter. Paragraph 62 referred to the possibility of bias on the part of a court in the host country in favour of the contracting authority and to the fact that, in court proceedings, short-term policies or political considerations might prevail over the legitimate interests of the private investors. Such criticisms should be couched in more restrained terms with the avoidance of language that might be construed as offensive. The statement in the third sentence of paragraph 62 that awards were not subject to appeal was incorrect. As a final example, paragraph 63, which referred to countries which had concluded that there were no compelling reasons of public interest for not allowing the parties to the project agreement to agree on the dispute settlement mechanism they considered most appropriate, seemed to imply that all countries with a tradition of exclusive jurisdiction of courts in issues arising from governmental concessions had reached such a conclusion.

2. **Mr. Choukri Sbaï** (Observer for Morocco), endorsing the French representative's observations concerning the reference in paragraph 62 to the possibility of bias, said that such comments were out of place in an official document. The impartiality of the courts should not be questioned.

3. **The Chairman** said that the opening words of the sentence in question in paragraph 62, "These parties may be concerned that a court of the host country might be biased ...", implied a subjective impression rather than an objective statement.

4. **Mr. Estrella Faria** (International Trade Law Branch), replying to the representative of France, said that the Secretariat regretted the confusion that had arisen from the French version of the document. The cited instances of error and lack of clarity in paragraphs 62 and 63 were problems of translation, the English version being worded differently. Steps would be taken to ensure that such problems did not recur in the final text.

5. While pointing out that the discussion in the notes on the advantages of arbitration over judicial proceedings was not new material, much of the chapter having been based on the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, he wished to emphasize that care would be taken to ensure that the final text contained no wording that might appear offensive.

Settlement of commercial disputes (legislative recommendation 2 and paras. 65-76) (*continued*)

6. **Mr. Wiwen-Nilsson** (Observer for Sweden) suggested that paragraph 68 of the notes, which was concerned with financing and related agreements, should perhaps specify that the host Government or contracting authority itself might have to sign inter-creditor or direct agreements with lenders.

7. Referring to paragraph 73, which dealt with the consolidation of arbitral proceedings, he wished to draw attention to the fact that it was frequently a requirement of turnkey contractors in privately financed infrastructure projects to be able to participate with the contracting authority in the settlement of disputes during the construction phase. The Secretariat might wish to give consideration to the problems which such an arrangement involved and to its desirability.

8. In view of his imminent departure, he wished to make some general comments on the guide as a whole. His delegation felt that the Secretariat's redrafting work should include a review of the legislative recommendations, for the purpose of making them more consistent with one another, as well as checking to ensure consistency between the recommendations and the notes. With the exception of chapter VIII, the substance of the notes did not require any further discussion. The Secretariat should eliminate from the guide any statements of a prescriptive nature that might be contrary to its purpose, which was simply to offer suggestions to States wishing to engage in privately financed infrastructure projects. Finally, his delegation preferred the redrafting work to be undertaken, not by a working group, but by the Secretariat with the assistance of such experts as it might choose.

9. **Mr. Lalliot** (France), referring to paragraph 74, which dealt with contracts between the project company and the party operating or maintaining the project facility, said that, in some legal systems, the public interest dimension of such contracts required that they be treated as administrative contracts. That called into question the validity of the expressions "commercial contract" and "commercial dispute".

10. **Mr. Kashiwagi** (Japan) said that the meaning of the expression "corporate instruments" in the heading to paragraph 67 was unclear. It was unusual to provide for conciliation in such instruments. He thought that the word "voluntary" in the expression "voluntary conciliation" in paragraph 67 should be deleted since it might imply that non-voluntary conciliation also existed.

11. **Ms. Nikanjam** (Islamic Republic of Iran), referring to legislative recommendation 2, said that, given the difficulty in fixing the dividing line between commercial and other disputes, the text should be redrafted and a definition of commercial disputes avoided.

Disputes involving other parties (legislative recommendations 3 and 4 and paras. 77-82)

12. **Mr. Wallace** (United States of America), referring to recommendation 3, suggested that a greater distinction should be made between the concessionaire's different consumers and the different types of dispute settlement mechanism that would be appropriate, for example in the case of power purchase agreements, as discussed in paragraph 77 of the notes.

13. Since privately financed infrastructure projects would increase in number and volume and more countries would establish regulatory regimes, he felt that the notes corresponding to recommendation 4 (paras. 80-82) dealt insufficiently with the subject and should include other related issues, such as the relationship between regulatory bodies and arbitral proceedings, the question of confidentiality and the resolution of disputes arising at the time of termination of the project.

14. **Mr. Choukri Sbaï** (Observer for Morocco) said that, while acknowledging the emphasis placed on the right of the consumer to resort to the courts, he wished to point out that it would be useful for the host country to adopt statutory provisions that discouraged fraud and misleading advertising and that recognized consumer protection agencies and their right to take legal action.

15. **Mr. Lalliot** (France), concurring with the comments by the United States representative, said that recommendation 3 needed to be more clearly worded so as to differentiate between the different categories of customer, namely users who were parties to a contract and would be able to resort to arbitration and private individuals for whom simplified dispute settlement mechanisms, such as conciliation but rarely arbitration, were available. There should be no implication in recommendation 3 or the related notes that the effectiveness of such mechanisms for settling disputes would be to the detriment of the user's legitimate rights.

16. He suggested that the examples of industrial sectors mentioned in the last sentence of paragraph 80 could include telecommunications.

17. **The Chairman** said that the Commission had thus concluded its consideration of chapter VIII.

Introductory chapter: introduction and background information on privately financed infrastructure projects (continued) (A/CN.9/458/Add.1; A/CN.9/XXXII/CRP.2)

18. **Mr. Lee Yong-shik** (Observer for the Republic of Korea) said that, following the introduction of his delegation's proposal, contained in document A/CN.9/XXXII/CRP.2, for a new paragraph 2 of the introductory chapter of the guide (A/CN.9/458/Add.1), some delegations had expressed concern regarding the last sentence of the proposed text, in particular the remark that the notes were "not intended to be an interpretative guide to the recommendations". In order to accommodate those concerns, he suggested that that sentence could be amended to read "They provide background information to enhance the understanding of the recommendations".

19. **Ms. Nikanjam** (Islamic Republic of Iran) said that her delegation could accept the proposal of the observer for the Republic of Korea with the amendment just read out.

20. **Mr. Choukri Sbaï** (Observer for Morocco) said that the proposal originally made by the delegation of the Republic of Korea had been redrafted following consultations with a number of delegations in order to make it more understandable. For his part, he found the revised version acceptable.

21. **Mr. Kovar** (United States of America) supported the proposal. He appreciated the efforts of the delegation of the Republic of Korea to find an acceptable formulation.

22. **Mr. Lalliot** (France) agreed that the proposed text was the product of considerable efforts to reconcile differing views.

23. **Mr. Mazilu** (Romania) said that the revised text was acceptable to him.

24. **The Chairman** said that there seemed to be general agreement on the proposed text as amended.

Chapter II. Project risks and government support (continued) (A/CN.9/458/Add.3; A/CN.9/XXXII/CRP.3)

25. **The Chairman** invited the United States representative to introduce his delegation's proposal, distributed as document A/CN.9/XXXII/CRP.3.

26. **Mr. Kovar** (United States of America) said that, during the Commission's discussion of chapter II (A/CN.9/458/Add.3), his delegation had suggested that a more precise description of the heightened risk which potential investors faced in modern project financing structures might be helpful. It was now proposing additional text, for incorporation wholly or substantially in chapter II, as new paragraphs 2 and 4 of section A, existing paragraph 2 being renumbered as paragraph 3.

27. **The Chairman** said that, according to his recollection, it had been decided that the new text would be incorporated in the introductory chapter of the guide. However, in order to expedite the Commission's deliberations, he suggested that the question of the exact place of its insertion should be left open.

28. **Mr. Mazilu** (Romania) said that, while he found the content of the United States proposal acceptable, he felt that the place of insertion should be as already decided upon by the Commission.

29. **Mr. Lalliot** (France) said that the proposal was very useful. He did not regard it as inappropriate for the text, which dealt with risk analysis, to be included in chapter II, which, as its heading indicated, was concerned with project risks, but he did not feel the question of location to be an important issue. He wondered whether the words "in developing countries" in the second sentence of proposed new paragraph 2 should be deleted since, in his view, it was not only developing countries whose growing needs for infrastructure capital in recent years had not been met by traditional sources of debt financing. In the penultimate sentence of that paragraph, the words "and its courts" could perhaps be omitted from the phrase "the host Government, its agencies and its courts" since the host country's courts could be assumed to be included within the generic term "agencies" and did not need to be singled out. He proposed a linguistic change in the French version of that sentence. Finally, he queried the renumbering of the paragraphs.

30. **The Chairman** said that there appeared to be general support for the deletion of the words "in developing countries". The point raised regarding the word "courts" was a drafting matter which could be left to the Secretariat. He took it that the United States proposal was acceptable in substance to the Commission.

Organization of work

31. **The Chairman** said that the Commission was expected to finalize the guide in the course of its next session. It was clear from the deliberations at the current session that a certain amount of rewriting needed to be done. He therefore proposed that the preparation of a new draft be undertaken in the meanwhile by the Secretariat, in consultation with experts, for examination by the Commission at its next session with a view to checking that the text submitted to it was in line with what had been discussed and decided upon at the current session. No more than two days might be available to deal with the topic at the next session, which would be insufficient for a reopening of the debate on the substance of the guide.

32. **Mr. Herrmann** (Secretary of the Commission) said that the Commission, when deciding on the time that it should devote to completing the guide, would need to take account of the time it wished to allocate to other items on the agenda of the next session, in particular the topic of receivables financing. On the basis of the work that would remain to be done following the Secretariat's revision of the draft text with expert assistance, he believed that, with the Commission undertaking a quality control of the text, leaving editorial matters to the discretion of the Secretariat, two days would be sufficient. Delegations could assist by informally submitting observations or suggestions in advance, either orally or in writing. He recalled that some delegations had refrained at the current session from commenting on some parts of the guide, for example in chapter VIII, since they were to be abridged.

33. **Mr. Wallace** (United States of America) said that, given the further work required on chapter VIII, the timely receipt by delegations of the new draft would assist them in preparing their submissions to the Secretariat.

34. Concurring with the observer for Sweden that the discussion of the notes should not be reopened, he felt that

any experts engaged to assist the Secretariat should devote most of their energies to the reformulation of the legislative recommendations, which the Commission had not had an opportunity to examine as a whole and check for consistency, adequacy of content and suitability of tone. As was clear from paragraphs 202 to 204 of the Commission's report on the work of its thirty-first session (A/53/17), the feeling had been that the recommendations in their existing form were not satisfactory to the Commission. As a simple method of working, the Secretariat could consolidate the revised recommendations in a single document for consideration by the Commission.

35. Finally, while appreciating the financial, time and other constraints to which the Secretariat was subject, he wished to emphasize that if delegations could receive the final draft documents in sufficient time for circulation prior to the next session, that would help to advance the work on the guide. It was important to many countries that it be a good product.

36. **Mr. Mazilu** (Romania) said that the proposals and suggestions put forward at the current session called for a considerable amount of work to finalize the guide. While he was confident of the Secretariat's capabilities, he felt that consideration should be given to engaging a group of experts to assist it in producing a text of high quality.

37. Like the United States representative, he recognized the need for the text to be well written in order to promote the adoption of specific legislation. His delegation felt that two days might be insufficient to complete the guide. However, the decision as to the allocation of time should be deferred until the next session, by which time the members of the Commission would have the final draft before them.

38. **Mr. Nur** (Sudan) said that, unlike the Arabic text of the draft legislative guide, the Arabic version of the Commission's report on the work of its last session (A/53/17) was written in standard language that was readily understandable to legislators. He wished to suggest that the translation into Arabic of the final text of the guide should be undertaken by the translators who had worked on that report.

39. **The Chairman** said that a practice existed whereby translations of legal texts into German, which was not an official language of the United Nations, were forwarded to the German Government for review and comment. He wondered whether delegations could, in similar fashion, look at the different language versions prior to finalization.

40. **Mr. Choukri Sbaï** (Observer for Morocco), concurring with the remarks of the representative of Sudan, said that it was necessary for translations of UNCITRAL texts either to be prepared by translators well versed in legal matters or to be reviewed by legal experts. Some of the specialized terms appearing in the Arabic version of the draft guide were unclear.

41. His delegation was fully confident that the Secretariat, with its knowledge of which experts to call upon, could undertake the preparation of the final draft of the entire guide. It would not be the first time that it had been requested to perform tasks of that kind.

42. With regard to the schedule of work for the Commission's next session, he felt that the decision as to whether more than two days would be required to finalize the guide should be left open. It was important to ensure a good final product.

43. **Mr. Lalliot** (France) said that he had reservations on entrusting the work to a group of experts. No such group, however competent, could take the place of an official United Nations body or be as representative as or have the legitimacy of delegates empowered to act on their Governments' behalf. Moreover, such groups worked in English and on documents prepared in English, which sometimes made it difficult to handle with sufficient precision complex matters involving countries' legal tradition and history.

44. Regarding the language problem, it might be possible to envisage in the longer term the use of legal linguistic experts as in the European Commission. The suggested practice of text checking as adopted for reviewing German translations could not be officially institutionalized owing to considerations of cost allocation. For budgetary reasons he did not believe the convening of a working group to be feasible. Therefore, he unfortunately saw no alternative to the use of a group of experts.

45. He agreed with other speakers that it was important to have the final draft available well in advance and that particular attention should be paid to certain chapters, especially chapter VIII, as well as to the recommendations, since they not only served an instructional purpose but were also intended for incorporation into countries' domestic legislation. Extensive work with emphasis on the recommendations and some chapters could mean a fairly short thirty-third session, but a cursory exercise might necessitate a long and costly session in order to have a good end product. He wished to reiterate his confidence in

the Secretariat and to confirm his delegation's full support and its availability for consultation.

46. **Mr. Gill** (India) said that the Secretariat was to be commended on its excellent work of drafting the guide. He believed that the Secretariat's continued efforts with the assistance of experts would enable the Commission to adopt the guide within a short period at its next session.

47. **Mr. Estrella Faria** (International Trade Law Branch), referring to the language question, said that UNCITRAL did not have its own translation unit. Its documents were translated by the translation sections within the conference services, which did not have any budget allocation for engaging lawyers with linguistic skills. The staff of some translation sections did include translators with legal backgrounds and the extent to which they were available to translate UNCITRAL documents was reflected in the quality of the work produced. However, as a result of cost-cutting measures, some translation work was outsourced. It was through delegations' assistance that the Secretariat could improve the quality of the texts.

48. On the question of the availability of documents, he wished to point out that, since in-session documentation had precedence over other documentation, the scheduling of meetings of other United Nations bodies sometimes gave rise to the late issue of UNCITRAL documents. The Secretariat would nevertheless do what it could within the limitations of its resources.

49. **Mr. Herrmann** (Secretary of the Commission) said that he wished to comment on the concern expressed by the representative of France regarding the use of expert assistance. The Secretariat perceived a group of experts, not as a substitute for a working group, but as an informal and flexible arrangement for engaging any number of specialists from whose input it could benefit. For example, in the case of the legislative guide, it was likely that the Secretariat, when looking into the question of dispute settlement methods applicable in the various phases of the project, would take advantage of its members' participation in arbitration workshops or in dispute settlement seminars to ask relevant questions and, when conducting its review of the legislative recommendations, it might consult different outside experts.

50. Turning to the language question, he recalled that, whenever the text of a convention or a model law was under discussion, the Secretariat convened a drafting group composed of six translators, usually senior revisers, each teamed up with a government representative having a specialist knowledge of the field concerned. That method of working was not practicable or in fact necessary with regard to the guide as a whole but might be feasible with regard to the legislative recommendations. The Secretariat would look into the possibilities of such an arrangement and, after reaching a decision, might approach six delegations covering the six working languages with a view to seeking their assistance.

51. **Mr. Al-Nasser** (Observer for Saudi Arabia) said that, since 1988, he had served on drafting groups as the Arabic language representative and had provided terminology guidance to the translators. He wished to appeal to the Arabic-speaking countries whose representative served on the Commission or its working groups to provide the Secretariat with terminology notes for use in improving the quality of the texts.

52. **Mr. Kovar** (United States of America) said that he considered the setting up of a language conforming group to be a good idea. However, it should not be a substitute for the group of experts but should be organized at the next session. He was unsure whether two days would be sufficient for the Commission's task.

53. **The Chairman**, summarizing the discussion, said that the substantive debate on the draft guide had now been completed. The text of the legislative recommendations and the notes would be revised in the light of the deliberations at the current session. That task, which would be undertaken by the Secretariat with the assistance of experts, would include the reformulation of the legislative recommendations, with a view to greater consistency, and work on improving the consistency between the notes and the recommendations. The final draft would then be submitted to the Commission for consideration at its thirty-third session in the year 2000. While it was appreciated that there would be less time to devote to that one topic at that session, it was not for the Commission to decide now on the precise number of days to be allocated.

54. He wished to make it clear that experts engaged by the Secretariat did not have decision-making authority but were called upon to prepare material to be presented to the Commission for adoption by it alone.

The discussion covered by the summary record ended at 3.50 p.m.